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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

Supreme Court No. 75-1251

Court of Appeals No. 75-1609

WILLIE DARDEN, JR.,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

Supreme Court No. .....

Court of Appeals No. 75-1009

WILLIE DARDEN, JR.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The petitioner, by his attorney, Neil H. Fink, prays that a Writ of Certoriari issue to review the judgment heretofore entered against him by the United States Court of Appeals, Sixth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals, Sixth Circuit, entered January 12, 1976 and judgment in accordance with that Opinion, hereinafter set forth as Appendix A and the District Court's Memorandum Opinion entered on November 6, 1974 is appended hereto as Appendix B.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 USC 1254.

QUESTION PRESENTED

The question presented by this Petition is: was it error for a district court to accept a plea of guilty when the defendant was required to provide the factual basis for the plea prior to the Court advising the defendant of the constitutional rights he was waiving by his plea of guilty?

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitutional Amendments V, VI, 28 USC 2255.

Rule 11 of the Federal Rules of Criminal Procedure.

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STATEMENT OF THE CASE

The Petitioner, Willie Darden, Jr., was charged in a three count Indictment with a violation of 21 USC 841(a)(1) on September 5, 1973.

On March 28, 1974, a plea of guilty was entered by Willie Darden, Jr., to Count II of the Indictment, charging him with knowingly and unlawfully selling and distributing approximately ten (10) grams of heroin, in violation of 21 USC 841(a)(1). The plea was taken by the Honorable Lawrence Gubow, United States District Judge for the Eastern District of Michigan, Southern Division.

During the proceedings prior to Petitioner Darden, furnishing the court with an incrimination factual basis for the plea, the Court in its inquiry addressed itself only to the Petitioner's age; the Petitioner's understanding of the nature of the charge; whether or not the Petitioner used drugs; the Petitioner's health status, and whether or not the Petitioner understood that a plea of guilty constitutes an admission of the charge.

Thereafter, the Petitioner Darden gave a factual confession to the Court on Count II of the Indictment. It was only after Petitioner Darden had confessed to the crime that the trial court advised Petitioner as to those fundamental rights which a plea of guilty waives, most notably his Fifth Amendment right against self-incrimination and his right to remain silent. On the basis of Petitioner's plea of guilty, on June 6, 1974, Willie Darden, Jr., was sentenced to twelve (12) years imprisonment. Counts I and III of the Indictment were dismissed on the Government's Motion.

On August 14, 1974, Defendant Darden filed a Petition to Vacate Sentence and to Withdraw his Plea of Guilty and plead anew, pursuant to 28 USC 2255.

Thereafter, on November 6, 1974, Judge Lawrence Gubow issued a Memorandum Opinion denying Defendant's Petition to Vacate Sentence (Exhibit B).

Petitioner Darden thereafter appealed to the Sixth Circuit Court of Appeals which, on January 12, 1976, affirmed his conviction (Exhibit A).

REASONS FOR GRANTING THE WRIT

A valid plea of guilty constitutes a waiver of three (3) federal constitutional rights; the right to a jury trial, the right to confront and cross-examine witnesses, and the privilege against self-incrimination. *Boykin v Alabama,* 395 US 238, 89 S Ct 1709, 23 L Ed 2d 274 (1969); *McCarthy v United States,* 394 US 459, 89 S Ct 1166, 22 L Ed 2d 418 (1969).

Due process requires that a waiver of a constitutional right be "an intentional relinquishment or abandonment of a known right or privilege." *Johnson v Zerbst,* 304 US 458, 464, 58 S Ct 1019, 82 L Ed 1461 (1938). *Boykin, supra,* stated specifically that waiver of the three (3) rights lost by pleading guilty could not be presumed from a silent record. The rationale for this holding is discussed by Mr. Justice Douglas at page 242:

> In *Carnley v Cochran,* 369 US 506, 516, 8 L Ed 2d 70, 77, 82 S Ct 884, we dealt with a problem of waiver of the right to counsel, a Sixth Amendment right. We held: 'Presuming waiver from a silent

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> record is impermissible. The record must show, or there must be an allegation and evidence which show, that an accused was offered counsel but intelligently and understandingly rejected the offer. Anything less is not waiver.'
>
> We think the same standard must be applied to determine whether a guilty plea is voluntarily made . . .

Petitioner here maintains that such intentional and knowing waiver of these constitutional rights must precede the virtual confession implicit in the requirement of a factual basis for a plea of guilty. Petitioner in the present case related to the Court the entire factual basis on which his plea was founded before he was apprised by the trial judge of the critical rights he was waiving. In effect, Petitioner confessed to the crime before he was advised of his right to remain silent. It does not strain logic to conclude that the recital of Petitioner's rights only after he had confessed was merely a meaningless ritual of waiver since the confession had effectively eliminated the value of those rights to the Petitioner.

From the time Petitioner testified as to the factual basis of his plea he was realistically precluded from any cause of action except continuing on with his plea. This situation became so inherently coercive that Petitioner lost his guaranteed right to assert his constitutional protections, and therefore, lost his free and independent choice of whether to plead guilty or elect to stand trial. At this point in time, Petitioner knew he had openly confessed not only to the trial judge but also to the Government attorney and to his own counsel. The psychological and institutional pressure on the Petitioner to continue with his plea became too great to permit him to rationally and intelligently

decide, as *Johnson, supra* and *Boykin, supra*, require, to waive his constitutional rights.

This Court recognized the psychological pressure on an accused in a very similar situation in *United States v Bayer*, 331 US 532, 67 S Ct 1394, 91 L Ed 1654 (1947). In *Bayer*, an accused had confessed to a crime, but the confession was held to be involuntary, and, therefore, inadmissible. The question before the Court was whether a second, later confession not shown to have been immediately attended by the same kind of improper police activities was admissible. The Court gave recognition of the same kind of psychological dynamics as are determinative of the case at bar.

> Of course, after an accused has once let the cat out of the bag by confessing, no matter what the inducement, *he is never thereafter free of the psychological and practical disadvantages of having confessed.* He can never get the cat back in the bag. The secret is out for good. 331 US 540 (Emphasis supplied).

The waiver of rights demanded by *Boykin, supra*, cannot be viewed as merely a *pro forma*, procedural matter which will be satisfied by a varying degree of judicial compliance. To the large majority of defendants, unschooled in the complexities of the law and of the legal process, a statement in clear, concise language of their basic constitutional rights, made in open court by the trial judge, may be the most important, and in most cases, the final safeguard from abuses of the plea bargaining system. While this procedure may commonly become ritualized, and many defendants may be adequately informed by their counsel of the implications of a guilty plea, this Court requires that *every* defendant must be advised by the judge of the rights being waived. The opportunity must be given for a defendant to exercise a constitutional right he may not have pre-

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viously been aware of or contemplated and halt the plea proceeding before the damage of a confession has been done. This Court emphasized the impact of the factual basis inherent in a guilty plea in *Kercheval v United States*, 274 US 220, 223, 47 S Ct 582, 71 L Ed 1009 (1927).

> A plea of guilty differs in purpose and effect from a mere admission on an extra-judicial confession; it is itself a conviction. More is not required, the Court has nothing to do but give judgment and sentence.

It would be highly unrealistic to assume that the Petitioner here, Willie Darden, with a ninth grade education, fully understood that had he elected to exercise his right to remain silent or his right to a jury trial, his subseqeunt trial would have been unprejudiced by his earlier confession during the plea proceeding. He may not have known that he could have, in the words of the *Bayer* Court, put the cat back into the bag. The contention of the Petitioner here is that a strictly enforced procedure of having the waiver recitation precede the factual basis testimony would prevent the coercive circumstances created in the case at bar.

Petitioner submits that the obvious parallel is that of the *Miranda* warnings. These warnings must be given before a confession will be admitted as evidence at trial. It can hardly be argued that *Miranda* warnings could just as well suffice if given after the confession has been obtained. The purpose of the warnings, both *Miranda* and *Boykin* are to insure intelligent and voluntary chosen waivers. An after the fact waiver in either case circumvents such a purpose. "The entry of a plea of guilty demands even more stringent safeguards than are required for confessions." *United States v Gilligan*, 303 F2d 961, 966 (2d Cir 1966).

Petitioner submits that the Court must inform a defendant of his rights at a point in time when he is able to act

on that knowledge. Given the gravity and finality of the plea-taking process, the attendant protections should be strictly enforced. It does violence to those protections to first secure an admission of guilt, and only then advise the defendant of its consequences and his right not to make it. Because the Petitioner's plea-based conviction is tainted by this fatal defect, it must be vacated.

CONCLUSION

Wherefore, by reason of the foregoing Petition, Petitioner prays that this Court issue a Writ of Certiorari to the United States Circuit Court of Appeals for the Sixth Circuit and hear this case on the merits.

Respectfully submitted,

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EXHIBIT A

ORDER

United States Court of Appeals
For The Sixth Circuit

No. 75-1009

(Filed January 12, 1976)

Willie Darden, Jr.,
Appellant,
v.
United States of America,
Appellee.

Before: Edwards, Lively and Engel, Circuit Judges.

This is an appeal from denial by the district court of a motion to vacate sentence and withdraw a guilty plea. The District Judge who received the guilty plea to a charge of knowing sale and distribution of heroin asked the defendant to describe the acts which he had committed and thereafter advised appellant of the various constitutional rights which he would be waiving in pleading guilty to the charge, including the Fifth Amendment right against self-incrimination. It is contended that where the court requires the pleading defendant to recite the factual basis for his plea, it is then too late for the court to advise him of his rights since, in effect, he has confessed in open court.

An examination of the transcript of the hearing at which the plea was received discloses that the defendant stated to the court that he was aware of his constitutional rights, that he had discussed all possible defenses with his attorney, who was present, and that he wished to proceed with

the plea of guilty which he had previously indicated would be entered. This occurred after the District Judge had advised the defendant of his constitutional rights and it was then that the court formally received the plea of guilty.

It is clear from examination of the transcript of the hearing at which the plea was taken that the district court complied with the provisions of Rule 11, Fed. R. Crim. P. We hold that no constitutional rights of the appellant were infringed or denied in these proceedings.

The judgment of the district court is affirmed.

Entered By Order of the Court.

/s/ John P. Hehman
Clerk

EXHIBIT B

MEMORANDUM OPINION

United States District Court
Eastern District of Michigan
Southern Division

Willie Darden, Jr., Petitioner, v. United States of America, Respondent.	Civil Action No. 74-72239

Petitioner, Willie Darden, Jr., through his attorney, has filed a Motion to Vacate Sentence and to permit Petitioner to withdraw his plea of guilty. The motion is filed pursuant to 28 U.S.C. §2255. The Government has sumbitted a brief in opposition to Petitioner's Motion.

On March 28, 1974, Petitioner pled guilty to Count 2 of a three-count indictment charging him with a sale of nar-

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cotics in violation of 18 U.S.C. §841(a)(1). Subsequently, on June 6, 1974, he was sentenced to twelve years in prison under the provisions of section 4208(a)(2), Title 18, U.S.C. with a special parole term of five years.

Petitioner claims that it was constitutional error for this court to accept his plea of guilty under the circumstance where Petitioner was not advised of the rights he was waiving until after a factual basis for the plea had been established. He asserts that, in order for a plea to be free and voluntary, a defendant must be advised of his rights before he effectively confesses his crime to the court.

In order for a federal court to accept a plea of guilty, the accused must be afforded those procedural safeguards contained in Rule 11 of the Federal Rules of Criminal Procedure. Under Rule 11, before judgment is entered, the court must be satisfied that there is a factual basis for the plea. In *McCarthy* v. *United States*, 394 U.S. 459 (1969), the Supreme Court held, pursuant to its supervisory power over the lower federal courts, that if a plea is accepted in violation of Rule 11 the accused must be given an opportunity to plead anew. This court declines to establish additional prophylactic protections in addition to those set forth in *McCarthy* which would require the trial court to follow a set sequence in order to comply with Rule 11.

Petitioner's claim that he was prejudiced by the procedures used in accepting his guilty plea is without merit. The transcript of the guilty plea proceedings indicates that the Petitioner understood completely the constitutional rights he was waiving and the consequences of his plea before the court accepted his plea of guilty. After being advised of his constitutional rights, Petitioner stated that he was satisfied with the advice of his counsel and that he wished to proceed with the guilty plea. If Petitioner felt compelled

in any way at any point during the proceedings, he could have requested that the guilty plea be withdrawn (Rule 32, Federal Rules of Criminal Procedure) and the admissions made by Petitioner could not be used against him at a subsequent trial. *Kercheval* v. *United States,* 274 U.S. 220 (1927); *DeChristoforo* v. *Donnelly,* 473 F.2d 1236 (1st Cir. 1973), reversed on other grounds 15 CrL 3062. In light of these protections, it cannot be said that Petitioner was prejudiced by the procedure used in accepting the plea. The record indicates that the guilty plea was voluntarily entered with full understanding of the consequences and in complete compliance with Rule 11.

In view of the foregoing, It Is Ordered that Petitioner's Motion to Vacate Sentence and to permit Petitioner to withdraw his plea of guilty and plead anew, be and the same is hereby Denied.

/s/ Lawrence Gubow
U.S. District Judge

Dated: November 6, 1974

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In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1251

WILLIE DARDEN, JR., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner claims that his guilty plea was invalid because the district court advised him of the constitutional rights waived by the plea only after petitioner had stated the factual basis for it.

On March 28, 1974, in the United States District Court for the Eastern District of Michigan, petitioner pleaded guilty to the knowing sale and distribution of heroin, in violation of 21 U.S.C. 841(a)(1). He was sentenced to twelve years' imprisonment, subject to the immediate parole eligibility provisions of 18 U.S.C. 4208(a)(2). Subsequently petitioner filed a motion under 28 U.S.C. 2255 to vacate sentence and withdraw his guilty plea, alleging that his in-court recitation of guilty acts during the Rule 11, Fed. R. Crim. P., proceedings precluded a voluntary waiver of the constitutional rights that he was thereafter told his guilty plea would waive. The district court denied the motion (Pet. Exh. B), and the court of appeals affirmed (Pet. Exh. A).

During the proceedings leading to the acceptance of petitioner's guilty plea the district court, following the requirements of Rule 11, Fed. R. Crim. P., asked him to relate the acts he had committed, whereupon petitioner described his participation in the sale of heroin alleged in the indictment. The court then advised petitioner of the constitutional rights that would be waived by his guilty plea (Tr. 33-35, 40),[1] and petitioner acknowledged his awareness of those rights and of all possible defenses available to him. Petitioner assured the court that he wished to proceed with his guilty plea (Tr. 41), and the district court, after satisfying itself that petitioner was acting voluntarily and intelligently, accepted it.

This procedure did not vitiate the validity of the plea. Petitioner does not claim that the district court failed to comply with the requirements of Rule 11; or that he did not already know what the effect of his guilty plea would be; or indeed that he would have refused to plead guilty had the court actually iterated his constitutional rights prior to his recitation of guilty acts.[2] Petitioner suggests (Pet. 7) that he "may not have known" that he could have changed his mind about pleading guilty after the court's explanation of his constitutional rights and that any admissions previously made by him could not have been used against him at a subsequent trial (see *Kercheval* v. *United States*, 274 U.S. 220), but petitioner was

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[1]"Tr." refers to the transcript of the plea and sentencing proceedings.

[2]Throughout the plea proceedings petitioner was represented by counsel, who at the outset informed the court that petitioner had a full understanding of his constitutional rights (Tr. 31).

assisted at the plea proceedings by counsel whose competency petitioner does not challenge. In these circumstances we submit that petitioner has failed to show a due process denial resulting from the order in which the district court fulfilled its responsibilities under Rule 11.

Petitioner's suggestion (Pet. 7) that this Court lay down a *per se* rule governing the order of proceedings under Rule 11 is unwarranted. This case itself is telling evidence that due process is not denied in every case in which establishment of the factual basis for the plea precedes the court's explanation of the rights waived. Indeed, petitioner suggests no reason to believe that the recitation of guilty acts will result in a defendant's feeling any more "coerced" than any other open-court indication by the defendant of his willingness to plead guilty that precedes the court's explanation of the effect of the plea. "The nature of the inquiry required by Rule 11 must necessarily vary from case to case," and there is no need for this Court to "establish any general guidelines other than those expressed in the Rule itself." *McCarthy* v. *United States*, 394 U.S. 459, 467-468 n. 20.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

APRIL 1976.

DOJ-1976-04